

*a***BP (SABAH) SDN BHD****v.****SYKT JUBRIN ENTERPRISE & ORS***b*

HIGH COURT SABAH & SARAWAK, KOTA KINABALU

RICHARD MALANJUM J

[CIVIL SUIT NO: K22-40 OF 1996]

23 SEPTEMBER 1998

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CIVIL PROCEDURE: Attachment - Garnishee order - Making garnishee order absolute - Whether necessary for a debt to be existing for garnishee order to be effective - Whether order should be varied

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CONTRACT: Assignment - Absolute assignment - Letter assigning all rights, title and interest in a contract - Construction of document - Whether an absolute assignment - Whether only a part assignment - Whether word 'absolute' necessary to give rise to effective assignment - Principle - Whether court to look at substance of document - Civil Law Act 1956, s. 4(3)

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The first respondent ('Jubrin') had secured a contract with the third respondent ('the JKR') to supply and deliver petrol and oil to various districts in Sabah. Following the contract, Jubrin arranged the supply to come *inter alia* from the appellant ('BP Sabah'). By letter dated 8 July 1995 ('the letter'), however, Jubrin notified the JKR that it had assigned all its rights and interest in the contract to the second respondent bank ('UOB'), and in the circumstances, directed the JKR "to pay all contract proceeds direct to our account with the said bank".

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Misunderstandings arose between BP Sabah and Jubrin, whereupon BP Sabah successfully sued Jubrin for goods sold and delivered. BP Sabah also alleged that Jubrin had some money with UOB, and in the event proceeded with a garnishee proceeding to retrieve the money. The garnishee proceeding apart, BP Sabah also applied under O. 73 r. 1(2) Rules of the High Court 1980 for an order that the JKR remit a certain sum of money to it. Both matters were heard simultaneously by the learned Senior Assistant Registrar ('SAR') whereupon the following orders were made, namely: (i) that a sum of RM 542,188.86 be paid by the JKR to UOB ('the first order'); (ii) that a sum of RM 586,880.26 be paid by UOB to the judgment creditor as a result of the garnishee proceeding aforesaid.

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BP Sabah appealed against the first order whilst UOB appealed against the second order. Before the learned judge herein, issues *inter alia* arose as to (i) whether, properly construed, the letter was an absolute assignment of the whole

contract or only a charge within the meaning of s. 4(3) of the Civil Law Act 1956 ('the Act'); and (ii) whether, as at the date of the garnishee order, there was a debt due from UOB to Jubrin. a

Held:

[1] The correct approach in construing a document would be to look at the substance, not just the label which had been attached to the letter. In the instant case, the letter stated that it had assigned all rights, title and interest in the contract payment to UOB, and the contract in question was the contract with JKR. The letter, in effect, also surrendered all the proceeds arising out of the contract. This being the case, BP Sabah's contention that the letter is only a part assignment is not therefore maintainable. Further, the letter's failure to mention the word 'absolute' would not make much difference to the assignment. It is the overall tenor of the document that should be taken into account. b

[2] In a garnishee proceeding no order can be made unless some person, at the time the order is made, is indebted to the judgment debtor. In the present case, there was a credit balance of RM 872.58 in Account No. 263-3-001897-0 whereas Account No. 263-3-001898-9 had a debit balance with no credit balance. Therefore, there was no debt due from UOB to Jubrin. On the facts, the garnishee order absolute ought to be varied as to affect only Account No. 263-3-001897-0 and the credit balance of RM872.58. c

Obiter:

[1] Earmarking of the funds was not an indication that the funds belonged to Jubrin and it was also not intended to defeat any potential claim on them. The existence of a debt by Jubrin to UOB at the material time would have entitled the latter to claim a lien on such funds. d

[BP Sabah's appeal dismissed; UOB's appeal allowed in part; garnishee order varied.] e

Case(s) referred to:

Curran v. Newpark Cinemas Ltd [1951] 1 All ER 295 (*refd*)

Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd [1988] 2 CLJ 194 (*refd*)

Khaw Poh Chhuan v. Ng Gaik Peng & Ors [1996] 2 CLJ 185 (*refd*) f

Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 (*refd*) g

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56 (*refd*)

Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 (*refd*) h

UMW Industries Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 (*refd*) i

a Legislation referred to:

Civil Law Act 1956, s. 4(3)

Evidence Act 1950, s. 103

Rules of the High Court 1980, O. 49 rr. 1, 3, O. 73 r. 1(2)

Court of Judicature Act 1873 [UK], s. 25(6)

b Law of Property Act 1925 [UK], s. 136(1)

For the appellant - Roland Cheng; M/s Roland Cheng & Co

For the 2nd respondent - Roderic Fernandez (Raymond Wong with him); M/s Wong & Shim

For the 3rd respondent - Zaleha Pandin

c Reported by WA Sharif**JUDGMENT****Richard Malanjum J:****d Preliminary**

There are two appeals to judge in chambers before me between the same parties arising from the two decisions made by the senior assistant registrar (SAR) on 15 January 1998. The first appeal is by the appellant herein namely, BP (Sabah) Sdn. Bhd. against the decision that the 3rd respondent, namely, the director of Jabatan Kerja Raya, Sabah, pays the sum of RM542,188.86 to the 2nd respondent, namely, United Overseas Bank (Malaysia) Bhd. (“the first appeal”). And the second appeal is by the Garnishee, United Overseas Bank (Malaysia) Bhd. against the decision ordering it to pay to the judgment creditor the sum of RM586,880.26 (“the second appeal”).

f Background Facts

For the purpose of these appeals these background facts are common to both. And the present dispute between the parties arose from an action Suit No. K.22-40 of 1996. Briefly, in that action the appellant claimed against the Syarikat Jubrin Enterprise (“Jubrin”) for payments of goods sold and delivered. It was not in dispute that Jubrin secured a contract with the 3rd respondent (contract no. HQ 38/95 (S)) to supply and deliver petrol and oil for a period of three years to various districts in Sabah. Jubrin in turn arranged the supply to come, *inter alia*, from the appellant. Differences however arose between the appellant and Jubrin. Hence the action not only against Jubrin but also against the 2nd respondent, United Overseas Bank (Malaysia) Bhd. After a full trial, judgment was given to the appellant. However as against the 2nd respondent the sum involved was only RM394,000. It has since paid the appellant the sum of RM694,000. But it is the stand of the appellant that Jubrin has some more money with the 2nd respondent. Thus it proceeded with a

garnishee proceeding. The appellant also applied under O. 73 r. 1(2) of the Rules of the High Court 1980 ("RHC") for an order that the money amounting to RM542,188.86 with the 3rd respondent be paid to it. Both matters were heard simultaneously by the learned SAR which involved the hearing of oral evidence of witnesses. Thereafter the impugned decisions were made. There was also a stay order made in respect of the garnishee order but no appeal was lodged against that stay order.

The First Appeal

It is common ground between the parties in this first appeal that the issue to be determined is on the interpretation of the letter dated 8 July 1995. However learned counsel for the appellant further submitted that a subsequent letter dated 13 July 1995 should also be taken into consideration in finding the true meaning of the first letter. Hence, having heard the respective submissions of learned counsel for the parties I agree that the primary issue to determine is on the true construction of the letter dated 8 July 1995 ("the letter"). To do that I bear in mind what was held in the case of *Malayan Banking Bhd v. P.K. Rajamani* [1994] 2 CLJ 25; [1994] 1 MLJ 405 in that the substance must be looked at and not just the label attached to the document. Of course it is also essential that the other surrounding circumstances should be considered.

The thrust of the contention of the learned counsel for the appellant is that the letter should not be construed as an absolute assignment. And he listed a host of reasons, *inter alia*:

- (i) that the word "absolute" is absence in the letter;
- (ii) that it is only part of a security document and thus only a charge within the meaning of s. 4(3) of the Civil Law Act 1956 ("the 1956 Act");
- (iii) that if it was an absolute assignment then the previous payments should have been paid directly to the 2nd respondent and not through the accounts of the 1st respondent. The 2nd respondent could not get the payments in its own name as it was only a privilege as stated in the letter of 13 July 1995. Further, "if there was an absolute assignment there should be a mechanism for the transfer of the legal title of the JKR (3rd respondent) money to the 2nd respondent on 8 July 1995 and subsequently for it to revert to the 1st respondent after the cheques paid off. In this case the legal title of the money has always been with 1st respondent." Thus the 2nd respondent was only the collecting agent of the 1st respondent. Moreover, the letter of 13 July 1995 can be said to have amended the letter;

- a* (iv) that there was nothing to assign as at 8 July 1995 since the performance bond was only granted on 25 July 1995. And that should also defeat the point on assignment of choses in action;
- b* (v) that the 2nd respondent did not come to court with clean hands since it continued to grant facilities to the 1st respondent over and beyond the sum stated in the performance bond;
- (vi) that there cannot be an absolute assignment of part of a contract. In this case the performance bond was only for the sum of RM1.8 million whereas the whole contract was worth RM36.9 million;
- c* (vii) that the contention of the 2nd respondent that there was an absolute assignment contradicted its defence of set-off and lien. Further, the 2nd respondent did not inform the court at the first opportunity available; and
- d* (viii) that the letter of discharge dated 20 August 1996 ("discharged letter") stated that the 2nd respondent would have no further claim upon its issuance.

e In response, learned counsel for the 2nd respondent submitted that the appellant should be estopped from denying that there was an assignment since that fact was pleaded by the appellant in its amended statement of claim. Other rebuttals tendered for the 2nd respondent are as follows, *inter alia*:

- f* (a) that it is a 'misconception that an assignment by way of security cannot be an absolute assignment. In fact most assignments are by way of security to banks and financial institutions';
- (b) that the mode of payment is not the determining factor. The document has to be looked at and in this case it is the letter;
- g* (c) that all assignments are in fact assignments of 'choses in action'. Hence there is no issue of nothing to assign;
- (d) that under s. 4(3) of the 1956 Act it is not necessary that consent must be obtained from the debtor. It is a matter between the assignor and the assignee;
- h* (e) that although the wordings in the letter may be similar to some decided cases, its interpretation need not be the same. There are also cases with similar words used but given different meaning;

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- (f) that the application of the appellant is under O. 73 of the RHC. Hence the 2nd respondent can come in as a claimant; *a*
- (g) that there is no question of the 2nd respondent coming to court with unclean hands. In the action proper the 2nd respondent was cited as a defendant only. Thus it was not required to disclose everything at the trial; *b*
- (h) that in fact the letter speaks of an assignment of the whole contract and not part of it; and
- (i) that the discharge letter clearly stated that the assignment would be discharged after 3 April 1996. And there is no dispute that the money in question concerns works done before that date. *c*

For the 3rd respondent it was submitted that payments to the 2nd respondent were in compliance with the court order of 15 January 1998 and all other procedures.

As the key issue is on the interpretation of the letter I am of the view that it is appropriate to reproduce it in entirety shorn of its formalities. And it reads thus:

Date: 8th July 1995

Pengarah Kerja Raya
Jabatan Kerja Raya
Ibu Pejabat
Kota Kinabalu
U/P: Jurutera Mekanik Kanan

Tuan,

RE: NOTICE OF ASSIGNMENT OF CONTRACT PROCEED IN RESPECT OF THE SUPPLY & DELIVERY OF PETROL AND OIL FOR THREE YEARS PERIOD TO VARIOUS DISTRICTS OF SABAH (CONTRACT NO. HQ.38/95 (S))

Your Contract Ref. No.DPWQ.C.15/17/698/1993 dated 13th June 1995 refer.

Please be notified that **we have assigned all our rights title and interest in the above contract payment due and payable in favour of Chung Khiaw Bank Ltd, Tuaran Branch.** (Emphasis added)

Please be further notified that you are to forthwith pay all contract proceeds direct to our Account (Account No. 263-3001-897-0) with the said Bank of No. 9 & 10, Jalan Datuk Dusing, 89200 Tuaran, Sabah. The said Bank is authorised to accept all such contract payment on our behalf and any receipt given by the said bank shall be deemed a good receipt and discharge for the sums paid and as if such receipt was issued by us.

- a* Please be further advised that this authority to remit all proceed to Chung Khiaw Bank Ltd. C/A. 263-3001-897-0 is irrevocable and cannot be revoked without written consent of the said Bank.
- Please acknowledge service by endorsing the duplicate copy of this letter and return the same to the said Bank.
- b* Yours faithfully
For JUBRIN ENTERPRISE
- Signed
- c* Cc M/S Chung Khiaw Bank Ltd
Tuaran Branch, Sabah
BP (Sabah) Sdn. Bhd
Yisu Industrial Centre, Lorong Kombang
Off KM 12, Jalan Tuaran, Kota Kinabalu
- d* For completeness it may also be in order that I should include two other letters, namely, the letter of 13 July 1995 and the discharged letter. The letter of 13 July 1995 reads:
- DATE: 13 JULY 1995
- e* Chung Khiaw Bank (Malaysia) Berhad,
Tuaran Branch,
No.9 & 10, Jalan Datuk Dusing,
89200 Tuaran
- Tuan-tuan,
- f* **Contract No.HQ. 38/95 (S)**
The Supply and Delivery of Petrol and Oil for Three Years Period to Various Districts of Sabah
- As requested by the contractor, this office will make all payments under the above contract in the name of the contractor, Syarikat Jubrin Enterprise, and channel them to you for the credit of the contractor's account No. 263-3001-897-0.
- g*
- Please note that this promise is given as a privilege and does not bind the Government in any way.
- h* 'BERKHIDMAT UNTUK NEGARA DENGAN BERSIH, CEKAP DAN AMANAH"
- Saya yang menurut perintah,
- Signed
(TAN GEOK KUI)
- i* b.p. Pengarah Kerja Raya

MW/

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s.k Syarikat Jubrin Enterprise
P.O. Box 10955,
88810 Kota Kinabalu

And the discharged letter reads as follows:

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20th August, 1996

Pengarah Kerja Raya
Jabatan Kerja Raya
Ibu Pejabat
88582 KOTA KINABALU

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Dear Sir

Subject: Supply and Delivery of Petrol and Oil for Three Years to Various
Districts of Sabah-Contract No. HQ 38/95 (S)

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The above refers.

We hereby give our consent to your Department for making progress payments under the above contract to Syarikat Jubrin Enterprise or his nominated payee for the supply and delivery of petrol and oil made after the 3rd day of April, 1996 based on the Deed of Assignment dated 15th August, 1996 and in consideration of Shell Timor Sdn Bhd for providing a Bankers' Guarantee for RM1,847,899-55 to you as replacement for our Bank Guarantee No. PG CTUA95/19 dated 25-7-95 which is to be discharged.

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However, for supplies made on or before 3rd April, 1996, you are to continue to make payment to our Bank for the credit of Syarikat Jubrin Enterprise's account No. 26330018970.

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Yours faithfully
For CHUNG KHI AW BANK (MALAYSIA) BHD

Signed
FOO NGEE KEE
VICE PRESIDENT AND MANAGER
SABAH BRANCHES

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Having reproduced the more relevant documents I think I should now note some of the judicial pronouncements by our courts as regards the law on absolute assignment and s. 4(3) of the 1956 Act. And that section reads:

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4(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been,

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- a* effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

b In the case of *Khaw Poh Chhuan v. Ng Gaik Peng & Ors* [1996] 1 MLJ 761 FC the court came to the conclusion that the assignment was absolute after considering what should be the proper construction of the documents before it. His Lordship Peh Swee Chin FCJ said this at p. 774:

- c* ... Therefore, on a true construction of the agreements, the question is this, was the beneficial interest of the assignor in the estates of both the deceased father and the deceased mother transferred unconditionally to the assignee? If the answer is affirmative, the assignment is absolute.

d And his Lordship went on to say thus at p. 775:

- ... In any event, compliance with s. 4 (3) is not a pre-requisite to the validity of an assignment, which is to be determined in the usual ways. Even without complying with s. 4 (3), eg even without notice of the assignment to such debtors, for the sake of arguments, the assignment would have been valid in equity in any event against the assignor.

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...

- ... If an assignment is valid in law or legal (ie legally binding on the assignor), then it is valid or legal as stated. Section 4 (3) has not made any alteration in the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperative, to join the assignor as a co-defendant.

f And in another case of *UMW Industries Sdn. Bhd. v. Ah Fook* [1996] 1 MLJ 365 his Lordship Chong Siew Fai CJ outlined the requirements of s. 4(3) when he said this at p. 370:

- g* We have considered s 4 (3) of the Civil Law Act 1956 referred to by counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:

- h* (1) that the assignment must be in writing under the hand of the assignor;
(2) that the assignment must be absolute and not by way of charge only;
and

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(3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action. *a*

If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

As to the assignment in writing, no particular form is necessary but it must be absolute, ie one that purports to pass the entire interest of the assignor in the chose in action. Thus in *Curran v. Newpark Cinemas Ltd* [1951] 1 All ER 295 (CA), Jenkins LJ dealing with s. 136 (1) of the Law of Property Act 1925 (English) the equivalent of which in our law is s. 4(3) of the Civil Law Act 1956, said: (at p 290 F-H) *b*

It is, no doubt, true that s 136 (1) does not require any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The subsection does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question. *c*

Looking at the deed of assignment dated 18 January 1983, we are convinced that the document, from the point of the wording or language therein used, is capable of constituting a valid assignment under s. 4 (3) of the Civil Law Act 1956. There is evidence that the deed dated 18 January 1983 was signed by a proper officer on behalf of the assignor, or at least there is no dispute or challenge to that. Thus conditions (1) and (2) above are fulfilled. *d*

Another case of *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1984] 2 MLJ 268 also discussed the provision of s. 4(3) of the 1956 Act. This case made reference to some English decisions on what may or may not be an absolute assignment. His Lordship Seah FJ at p. 269 went on to consider those cases which dealt with s. 25(6) of the Judicature Act 1873 (in *pari materia* with our s. 4(3)) in this way: *e*

... We would first of all refer to two cases, viz. *Comfort v. Betts* [1891] 1 Q.B. 737 and *Hughes v. Pump House Hotel Co. Ltd.* [1902] 2 KB 190 where the courts came to the conclusion that the documents amounted to an absolute assignment, not purporting to be by way of charge only. In the former case it was held that an assignment of a debt or legal chose in action may be absolute within the Judicature Act section 25 (6) although a trust is thereby created in respect of the proceeds of such debt or chose in action in favour of the assignee. In the latter case, the plaintiff on March 7, 1901 signed and gave to Lloyd's Bank, the following instruction: *f*

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- a* In consideration of your continuing a banking account with me the undersigned, and by way of continuing security to you for all moneys due or to become due to you from me alone, or jointly with others, either on the said account or otherwise, I hereby assign to you all moneys due, or to become due, to me from the Pump House Hotel Company Limited, of Llandrindod Wells, under or by virtue of a certain
- b* contract dated November 1, 1899, and made between the said company of the one part and myself of the other part (being a contract for completion of the new pump room and for making certain alterations and additions to the Pump House Hotel, Llandrindod Wells) and all other moneys, if any, due, or to become due, to me from the said company,
- c* including all moneys due, or to become due, for extras in connection with the works contemplated by the said contract; and I hereby empower you, on my behalf, and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see to the application thereof; also, if necessary, to sue for, or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned, or any part thereof, and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expense of recovering the moneys hereby assigned are to be paid out of the amount recovered; and I hereby undertake at your
- d* request and my cost to do and execute all such further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created.
- e*

It was held that the above-mentioned instrument having the effect of passing the whole right and interest of the assignor in the moneys payable under the building contract to the assignees by way of security, it was an absolute assignment (not purporting to be by way of charge only) within the meaning of s. 25 (6) of the Judicature Act 1873.

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- The other two authorities we would like to refer to are *Mercantile Bank of London v Evans* [1899] 2 Q.B. 613 and *Durham Brothers v. Robertson* [1898] 1 QB 765 where a contrary conclusion was reached by the courts. In the *Mercantile Bank* case the plaintiffs made an advance to a customer who executed the following assignment:
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- h* In consideration of your placing to my credit to-day the sum of £200, I hereby assign to you the whole of my rights and interest under the agreement dated June 1, 1897... as security for the repayment on demand of the said sum of £200 and any further sum or sums that you may from time to time hereafter advance to me either directly or by way of overdraft or otherwise howsoever, and I hereby appoint you my nominees in pursuance of the provisions of the said agreement, with power to exercise all my rights thereunder, either in my name or your
- i* own; and I hereby appoint you my irrevocable attorneys in the behalf.

It was held that the assignment was not an absolute assignment within the meaning of section 25(6) of the Judicature Act 1873. *a*

In the latter case a firm of building contractors delivered to the plaintiffs a document in the following terms:

Re Building Contract, South Lambert Road – In consideration of money advanced from time to time we hereby charge the sum of £1080, which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you. *b*

It was held that the document was not “an absolute assignment” (nor purporting to be by way of charge only) within s. 25(6) of the Judicature Act 1873 and that the plaintiffs could not recover in the action. *c*

Commenting on the Mercantile Bank case in Hughes case, Mathew L.J. said at p. 195: *d*

... general terms were used in making the assignment, but, when the whole instrument was looked at, it appeared that what was intended was only to assign so much of the debt or chose in action as would provide security for a debt of £200 ... Upon that becoming apparent it was held that the true character of the interest given was that of a charge only... *e*

It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee ... In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of section 4 (3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. *f*

Now the contents of the letter in my view are quite obvious. Paragraph 2 therein makes reference to assigning ‘all our rights title and interest in the above contract payment’. And the contract referred thereto is the contract with the 3rd respondent. Thus, there is no merit in the contention that there was only a part assignment. *g*

It may be argued that it would be most unreasonable to allow the 2nd respondent to have all the payments when the sum under the performance bond was limited to only a certain sum. To a third party that may be the case but *h*

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- a* I do not think the parties involved should be questioned on how they handled their business affairs. After all there was no clear evidence adduced that the arrangement had solely arisen due to the performance bond. In fact the contrary appears to be true. This can be inferred from the fact that the 2nd respondent even had to give its consent to the 3rd respondent as per exh. F (the discharged letter) of the affidavit of *Liang Sie Wey* affirmed on 14 March 1997.
- b* Incidentally, the implication from the discharged letter seems to me to have demolished any belief that the letter was amended by the letter of 13 June 1995.
- c* In respect of the contention that the word ‘absolutely’ was not used, I do not think the failure to invoke such a word could make much difference. In the final analysis it is the overall tenor of the document that should be taken into account. Even in the case of *Hughes (supra)* such word was not used. Yet the court there found that the assignment was absolute.
- d* As regards the point that there was no absolute assignment through the letter, with respect, I cannot agree. Paragraphs 3 and 4 of the same show nothing less than a complete surrender of the proceeds arising out of the contract. And the appellant knew of such an arrangement as a copy of the letter was sent to it. That probably explains the pleading of the appellant as contended by learned counsel for the 2nd respondent. Hence, I agree that the appellant should
- e* be estopped from denying the existence of such an assignment. To agree with the contention of the learned counsel for the appellant would make the labeling of a document crucial. But that would be contrary to the rule in construing a document as laid down in the *Malayan Banking Bhd* case (*supra*). In that case his Lordship Dzaiddin SCJ has this to say, at p. 410:
- f* In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance ...
- g* On the point that there was nothing to assign at the material time, I think that argument is based on the premise that the assignment was limited to the sum stated in the performance bond. But as indicated earlier the letter encompasses a wider effect than as proposed by learned counsel for the appellant. And I agree with learned counsel for the 2nd respondent that an assignment normally relates to ‘choses in action’.
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- Learned counsel for the appellant also raised the point that upon the issuance of the discharged letter the 2nd respondent had no longer any claim to make. That of course is quite misleading as it is clearly stated therein that payments for any supplies made on or before 3 April 1996 should continue to be affected
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by the arrangement of the parties. And when learned counsel for the 2nd respondent asserted that the sum in question was in respect of supplies before 3 April 1996 I heard no challenge from the learned counsel for the appellant.

As regards the points of coming to court with unclean hands and the failure to apply to vary the Mareva Injunction obtained earlier on by the appellant, I find no substance in them. As correctly pointed out by learned counsel for the 2nd respondent that at that material time there was no necessity to raise any question of assignment. Further, as argued that since the appellant has come to court under O. 73 of RHC there is nothing to prohibit the 2nd respondent from coming to stake a claim. To that I agree.

Finally on the fact that there was no direct payment to the 2nd respondent from the 3rd respondent, I do not think that should undermine the legal position of the letter of having created an absolute assignment. After all there was no authority tendered to support that such arrangement should be part and parcel of the requirements of a valid absolute assignment. And I do not think that is a prerequisite as s. 4(3) of the 1956 Act stipulates nothing of that sort.

As for the other points raised for the appellant, I do not think I need to discuss them in any detail. Suffice it to say that I find no merits in them. Accordingly and for the reasons stated hereinabove I dismiss this appeal and affirm the decision of the learned SAR. Costs for the 2nd and 3rd respondents are to be borne by the appellant here and below and to be taxed unless agreed.

The Second Appeal

Under this second appeal the 2nd judgment-debtor, United Overseas Bank (Malaysia) Bhd. as a garnishee is appealing against the garnishee order absolute of the learned SAR thereby ordering the payment of RM586,880.26 to the judgment creditor by the 2nd judgment-debtor.

It is the contention of learned counsel for the 2nd judgment-debtor that a garnishee order is only effective on the day of its service. And in this case it should be 4 March 1997. Order 49 r. 1 and r. 3 of the RHC were referred to in support of that preposition. The case of *Kedah Kelang Papan Sdn. Bhd. v. Hansol Sdn. Bhd. (Teknibina Advisory Services Sdn. Bhd., Garnishee)* [1988] 2 CLJ 194; [1988] 1 MLJ 434 was also cited.

As at 4 March 1997 learned counsel said that there was no longer any money due from the 2nd judgment-debtor to the 1st judgment-debtor. He added that the account the judgment creditor alleged to have had the money was not a subject of the mareva injunction. Learned counsel disclosed that the 1st judgment-debtor had in fact two accounts with the 2nd judgment-debtor, namely, account nos. 263-3-001897-0 (non-checking account) and 263-3-

- a* 001898-9 (checking account). Only the first account was a subject of the injunction. And although it could not be denied that money was paid into the second account prior to 4 March 1997 such sum was used by the 2nd judgment-debtor to reduce the debit-balance the 1st judgment-debtor had with the former. According to learned counsel the two officers of the 2nd judgment-debtor gave evidence of such a fact and they were opened to cross-examination.

- c* As an alternative argument learned counsel for the 2nd judgment-debtor submitted that even if there was money due his client was entitled to use it to set-off debit-balances of the 1st judgment-debtor by reason of being the banker. The 1st judgment debtor, according to learned counsel, owed his client in excess of RM1.5 million at the material time.

- d* In respond learned counsel for the judgment creditor conceded on the point pertaining to the effective date of a garnishee order. But he asserted that there was money due to the 1st judgment-debtor at the material time as the 2nd judgment-debtor admitted it, save that the payment was 'earmarked'. And this was how learned counsel put it:

- e* Garnishee 'earmarked' RM586,012.12 for JKR cheques paid into account no. 263-3001-898-9 after 11/4/96 because suspect that cheques covered by Mareva Injunction. "Earmarking" is admission of non-absolute assignment ... Earmarking concedes that monies belong to 1st Judgment-Debtor ... Hence UOB monies are a "debt" to 1st Judgment Debtor and can be garnished under O. 49 r. 2.

The other points raised by learned counsel are, *inter alia*:

- f* (1) that debt due under O. 49 r. 1 RHC 1980 means "a sum payable in respect of a liquidated money demand recoverable by action" and refers to earmarked monies. As the 2nd judgment-debtor had earmarked the payment of RM586,012.12 such amount became due and payable;
- g* (2) that there should be no set-off and lien allowed as the banking relationship between the garnishee and the 1st judgment debtor still subsisting;
- (3) that it is for the garnishee to object to the order being made absolute. In this case "no evidence of set-off and lien until after garnishee nisi filed on 4 March 1997";
- h* (4) that to allow set-off and lien now would circumvent the mareva injunction. Garnishee acted at its own peril for not applying to vary the Mareva Injunction;
- i* (5) that "Garnishee has dirty hands having failed to comply with mareva orders and wilfully withheld information at the trial";

- (6) that there can be no lien as cheques were cashed and monies collected on behalf of the 1st judgment-debtor and “represents indebtedness by garnishee to customer. Garnishee cannot have lien on own indebtedness. Garnishee could not have credited monies to 1st judgment debtor’s accounts without varying mareva.”; **a**
- (7) that “although there is no money shown now, the fact that appellant (2nd judgment-debtor) admitted earlier and that they should not be now allowed to bring fresh evidence, it should now be taken that there is money in the account.” **b**
- (8) that the 2nd judgment-debtor was merely a collecting agent of cheques and thus by merely crediting them to reduce the 1st judgment-debtor’s overdraft did not make the former a holder in due course; **c**
- (9) that “even if set-off and lien allowed, impossible to grant set-off and lien to garnishee (2nd judgment-debtor) because garnishee’s SIC dated 15 March 1997 to permit set-off and lien not heard. Charging order on UOB monies took effect on 4 March 1997 well before SIC dated 15 March 1997. Hence even if variation allowed, garnishee nisi takes precedence.”; and **d**
- (10) that payment into the account of the 1st judgment-debtor and set-off would be contradictory. **e**

In reply to the above contentions learned counsel for the 2nd judgment-debtor submitted that his client came in as a competing creditor. As such the court has to look at other creditors before making the order absolute. And he explained that no evidence of being a creditor was adduced at the trial proper as it was not the appropriate time. But it should not detract the fact that the 2nd judgment-debtor had priority over other creditors. Learned counsel further submitted that the “word ‘earmarked’ and ‘fund available’ were used in the trial. But we did not earmark the fund for judgment creditor. Neither we are conceding the fund available for judgment creditor. We say that we are taking the fund as we are prior creditor. Court should not be blinded by the words used. Should look at the account produced. No money available. No separate account set-up. The account was already in overdraft and when payment came in it was swallowed by the overdraft. Appellant (2nd judgment-debtor) cannot be stopped from showing no money available. The rules allow a creditor to come anytime before order made absolute. Mareva injunction did not create priority to the judgment creditor.” **f**

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Now to begin, I think the law on garnishee proceeding is quite settled. And this is how Lim Beng Choon J put it in *Kedah Kelang Papan Sdn. Bhd.* (*supra*) at p. 43: **i**

- a* From the principles enunciated in the aforesaid cases, the following propositions can safely be distilled:
- (1) No garnishee order can be made unless some person, at the time when the order is made, is indebted to the judgment debtor. If there be a debt in presenti, of course an order can be made to attach the debt.
- b*
- (2) If there is not a debt payable in presenti, but there is a debt in existence, debitum in presenti, but payable in the future, such an order can still be made with regard to the debt whether legal or equitable.
- c*
- (3) The words “or accruing” are intended to apply to those cases in which there are debit in *presenti solvendum in futuro* (debts owed at present time payable in the future). It is not enough to show that it is very probable that there soon will be a debt; it must be shown that there is a debt.
 - (4) A debitum in presenti not yet actually payable is nevertheless a debt which is represented by an existing obligation.
- d* I have no reason to disagree with his Lordship on his synopsis of the law.
- The crucial issue therefore is to determine whether there was a debt due from the 2nd judgment-debtor to the 1st judgment-debtor as at 4 March 1997. This is a question of fact to be considered on the evidence adduced in this case
- e* since the 2nd judgment-debtor has disputed any liability.
- Although the learned SAR called for evidence yet in her ruling it was not indicated whether she rejected the testimonies of the witnesses called. But on perusal of the notes of proceeding I find that the evidence is very much a matter of examining the bank statements as tendered (P1-P13). Moreover, as
- f* this is an appeal to judge in chambers it is in fact a rehearing of the matter. (See: *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 CLJ 716; [1994] 2 MLJ 97).
- It is not in dispute that as at 4 March 1997 there was a credit balance in the
- g* sum of RM872.58 in the account no. 263-3-001897-0. Thus that sum has therefore been properly attached.
- The larger dispute is on the account no. 263-3-001898-9. And firstly I find that this account was not affected by the mareva injunction obtained by the judgment-creditor. As such it was not on the same footing as the first account.
- h*
- On perusal of the bank statements as tendered (P1-P13) it is quite obvious that as from the month of April 1996 to the end of March 1997 they show debit-balances. In particular, between 28 February 1997 and 31 March 1997 the debit balance exceeded the sum of RM900,000. No credit balance was
- i* shown at any time. As such I agree with learned counsel for the 2nd judgment-

debtor that as at 4 March 1997 there was no debt due from the 2nd judgment-debtor to the 1st judgment-debtor. On this ground alone that I should allow this appeal in part and vary the garnishee order absolute made by the learned SAR.

a

From the cross-examination by the learned counsel for the judgment-creditor of PW2, Mr. Lo Shun Phin an officer with the 2nd judgment-debtor it was suggested that the bank statements as tendered were incorrect. However other than that bare assertion I find no evidence adduced that that was the case. And since it was the judgment-creditor which made that assertion the onus should be on it to establish such a fact. (see: s. 103 of the Evidence Act). As it had failed to do so those bank statements (P1-P13) should be taken as correct.

*b**c*

As regards the ear-marking of the funds, I find that the officers of the 2nd judgment-debtor had given the reason for doing so. According to PW2 the funds were ear-marked "because we were not sure whether this money was subjected to the injunction granted by the court." And in answer to an earlier question PW2 said this:

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Q. Can you confirm that the earmarked fund of RM381,307.29 means that Syarikat Jubrin can draw on this account?

A. No.

e

It was also put to PW2 thus:

Put: The actual earmarked funds is (*sic*) RM586,012.12 as at 31/3/97 based on the testimony of Mr. N.K. Foo given at the trial.

f

A. No.

Put: RM381,307.29 or RM586,12.12 was earmarked because the bank had reason to suspect that these monies were covered by the injunction.

A. Yes

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In Re-examination PW2 was asked:

Q. 'Earmark' means the customer cannot withdraw it?

A. Yes, but the bank can override that and debit the account.

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And on being referred to P1 his answer was:

All the figures on the right column are debit figures. Earmark does not prevent the CR & DR of account by bank. Only customer cannot withdraw. All the credits in the statement went towards reducing the overall outstanding OD balance. Normal practice to debit account when there are charges to the account although the facility has been withdrawn.

i

- a* Thus, the ear-marking was not an indication that the funds belonged to the 1st judgment-debtor and that it was intended to defeat any potential claim on them. It should also be noted that it was not disputed that the 1st judgment-debtor owed the 2nd judgment-debtor a substantial sum at the material time. As such it is quite reasonable to assume that the funds would have been taken
- b* to reduce the outstanding account without any delay if not for the doubt over the extent of the injunction order. Hence, I find no substance on the point of ear-marking as raised by learned counsel for the judgment-creditor. And I do not think the submission of counsel at the trial proper or the testimony of a witness thereof should be deemed to close all avenues for the 2nd judgment-
- c* debtor to dispute any liability in a garnishee proceeding. The crucial point is whether there was a debt owing and due to the 1st judgment-debtor at the relevant time from the 2nd judgment-debtor. As shown in the bank statements (P1-P13) the account no. 263-3-001898-9 was in debit-balance as at 4 March 1997.
- d* In view of my conclusion hereinabove I do not think it is necessary for me to dwell into the issues of lien and set-off as submitted by learned counsel for the 2nd judgment-debtor. Suffice it to say that the existence of the debt of the 1st judgment-debtor with the 2nd judgment-debtor at the material time would have entitled the latter to claim a lien on such funds.
- e* As for the other points submitted by learned counsel for the judgment-creditor I do not think they bear any merits as to change my conclusion.
- Accordingly, for this second appeal I allow it in part and hereby vary the garnishee order absolute made by the learned SAR in that it should only affect
- f* account no. 263-3-001897-0 and specifically on the credit balance of RM872.58. I further order that in view of the result of this appeal the judgment-creditor should pay to the 2nd judgment-debtor two-third of the costs here and below to be taxed unless agreed.
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- i*